

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.104: Collection functions
(Also Part I, §§ 6672; 301.6672)

Rev. Proc. 2005-34.

SECTION 1. PURPOSE

This revenue procedure sets forth updated procedures for appeals of proposed trust fund recovery penalty assessments arising under section 6672 of the Internal Revenue Code.

SECTION 2. BACKGROUND

.01 Section 6672(a) imposes a penalty against any person required to collect, truthfully account for, and pay over any tax imposed by the Code who willfully fails to collect, or truthfully account for and pay over the tax, or who willfully attempts in any manner to evade or defeat the tax.

.02 Under section 6671(b), the term "person" includes an officer or employee of a corporation or a member or employee of a partnership, who, as an officer, employee, or

member of the corporation or partnership, is under a duty to perform the act in respect of which the violation occurs.

.03 Section 6672(b), as amended by the Taxpayer Bill of Rights 2, Pub. L. No.104-168, 110 Stat. 1465 (TBOR 2), provides that the Internal Revenue Service is required to send a notice of proposed assessment to any taxpayer against whom it intends to assess a trust fund recovery penalty. In this context, section 6672(b) uses the broader term “taxpayer” because the notice of proposed assessment must be sent to taxpayers who may not ultimately fit within the definition of “person” as set forth in section 6671(b) and as used in sections 6672(a), (c), (d) and (e).

.04 Rev. Proc. 84-78, 1984-2 C.B. 754, which sets forth procedures for appeal of the trust fund recovery penalty, does not reflect the amendments made to section 6672 by TBOR 2.

SECTION 3. SCOPE

The procedures in this revenue procedure apply to trust fund recovery penalty cases relating to employment and excise taxes imposed under the Internal Revenue Code, except when collection is in jeopardy.

See section 6672(c) for procedures relating to a stay of collection if a bond is furnished. See section 6672(d) for provisions regarding the right to contribution if more than one person is liable for the trust fund recovery penalty. See section 6672(e) for rules regarding the exception for voluntary board members of tax-exempt organizations.

SECTION 4. PROCEDURE IN AREA COLLECTION DIVISIONS

.01 If the Service determines that a taxpayer is liable for the trust fund recovery penalty, the Service will propose the assessment of the penalty and inform the taxpayer of the determination by notice. The notice of proposed assessment will provide the taxpayer an opportunity to sign a form agreeing to the proposed assessment or to dispute the proposed assessment by appealing the proposed assessment within 60 days of the date on the notice (75 days if the notice is addressed to the taxpayer outside of the United States) and requesting an Appeals conference.

.02 The Service will assess the penalty if the taxpayer fails to appeal the proposed assessment within the period specified in Section 4.01 of this revenue procedure and the Service has not received a signed agreement from the taxpayer agreeing to the assessment. If the taxpayer submits a timely appeal in response to the notice of proposed assessment and requests that the case be referred to Appeals, the case will be reviewed in the appropriate compliance office to determine whether further action or development is required before referring the case to Appeals.

SECTION 5. PROCEDURE FOR APPEALING A PROPOSED ASSESSMENT AND REQUESTING AN APPEALS CONFERENCE

.01 Small Case Appeals. If the proposed penalty assessment for any tax period is \$25,000 or less, the taxpayer may appeal the proposed assessment by completing and submitting in writing two copies of a small case appeal request. The request should be mailed to the attention of the IRS officer or employee named on the notice of proposed assessment as the "Person to Contact" at the address shown on the front of the notice. The request must include the following:

(1) A copy of the notice of proposed assessment or the date and number of the notice and the taxpayer's name and social security number, along with any information that will help the Service locate the taxpayer's file;

(2) A statement that the taxpayer is requesting an Appeals conference; and

(3) A list of the issues that the taxpayer is contesting and an explanation of the basis for the taxpayer's disagreement. The explanation should include the following:

(a) The taxpayer's duties and responsibilities during the tax periods listed in the notice of proposed assessment. In particular, the taxpayer should describe whether the taxpayer had the duty and authority to collect, account for, and pay over trust fund taxes; and

(b) If the taxpayer contests the Service's calculation of the penalty, the taxpayer should identify the dates and amounts of payments that the taxpayer believes the Service failed to consider and/or any computational errors made by the Service.

.02 Large Case Appeals. If the proposed penalty for any tax period is more than \$25,000, the taxpayer may appeal the proposed assessment by submitting a formal written protest. In addition to the items required by section 5.01(1) and (2) of this revenue procedure, the formal written protest must include the following:

(1) The tax period(s) involved;

(2) A list of the findings the taxpayer is contesting;

(3) A statement of facts that describes the following:

(a) The basis for the taxpayer's disagreement with the proposed assessment, including specific facts that support the taxpayer's arguments;

(b) The taxpayer's duties and responsibilities during the tax periods listed in the notice of proposed assessment. In particular, the taxpayer should describe whether the taxpayer had the duty and authority to collect, account for, and pay trust fund taxes; and

(c) If the taxpayer contests the Service's calculation of the penalty, the dates and amounts of payments that the taxpayer believes the Service failed to consider and/or any computational errors made by the Service;

(4) An explanation of any law or other supporting authorities on which the taxpayer relies; and

(5) The following signed declaration under penalties of perjury that the statement of facts required by section 5.02(3) is true:

"Under penalties of perjury, I declare that I have examined the facts presented in this statement and any accompanying information, and to the best of my knowledge and belief, they are true, correct, and complete."

.03 A taxpayer may contest all of the periods listed in the notice in a single protest; however, if the proposed penalty for any one of the periods is more than \$25,000, the taxpayer must submit a formal written protest described in section 5.02.

SECTION 6. REPRESENTATION AT CONFERENCE

A taxpayer may represent himself at an Appeals conference or be represented by someone who is authorized to represent taxpayers under Treasury Circular 230, Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service (31 C.F.R. Part 10). If an authorized representative attends an Appeals conference without the taxpayer, the representative must have filed a power of attorney, see 26 C.F.R.

§§ 601.501 through 601.509, which also will authorize the representative to receive or inspect confidential tax information. If a representative prepares and signs a request for appeal or a written protest on behalf of the taxpayer, the representative must submit a declaration stating whether he or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

SECTION 7. EXTENSION OF THE PERIOD OF LIMITATIONS FOR ASSESSMENT

If the notice of proposed assessment is mailed or delivered before the period for assessing the trust fund recovery penalty ends, the assessment period will not end before the later of:

- (1) The date that is 90 days after the Service mailed or delivered the notice of proposed assessment; or
- (2) If the taxpayer has filed a timely appeal in response to the notice of proposed assessment, the date that is 30 days after the Secretary makes a final determination regarding the appeal.

SECTION 8. PROCEDURE IN AREA DIRECTOR'S OFFICE FOR DISPOSING OF CLAIMS

.01 If the Service has assessed the trust fund recovery penalty because of the failure of the taxpayer to respond to the notice of proposed assessment within the 60-day period (or 75-day period, if applicable) or on the basis of the decision of Appeals, the taxpayer generally must pay the appropriate portion of the penalty and file a claim for refund in order to pursue judicial review.

.02 Once an assessment has been made, the Service generally will not consider any claim for abatement unless the taxpayer establishes to the compliance area director's

satisfaction that unusual circumstances merit consideration of such a claim. If the compliance area director decides not to consider a taxpayer's abatement claim, the taxpayer will be notified of that decision.

.03 Only Appeals may consider a claim for abatement if the assessment was made on the basis of a decision of Appeals. If the assessment was made based on a decision of Appeals, the area director will forward the claim to Appeals for consideration. The taxpayer will be notified if Appeals decides not to consider a taxpayer's abatement claim.

SECTION 9. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 84-78 is superceded.

SECTION 10. EFFECTIVE DATE

This revenue procedure is effective for all trust fund recovery penalties proposed on or after May 20, 2005.

DRAFTING INFORMATION

The principal author of this revenue procedure is Kevin Connelly of the Office of the Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue procedure contact Mr. Connelly on (202) 622-3630 (not a toll-free call).